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7
 8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION

11 ELIZABETH WEISS,
 12 Plaintiff,
 13 v.

No. 5:22-cv-00641-BLF

**PLAINTIFF'S FIRST AMENDED
 COMPLAINT FOR
 DECLARATORY JUDGMENT
 AND INJUNCTIVE RELIEF**

14 STEPHEN PEREZ, in his official
 capacity as Interim President of
 San Jose State University;
 15 VINCENT J. DEL CASINO, in his
 official capacity as Provost of
 16 San Jose State University; WALT
 JACOBS, in his official capacity as
 17 Dean of the College of Social Sciences
 at San Jose State University;
 18 ROBERTO GONZALEZ, in his
 official capacity as Chair of the
 19 Department of Anthropology at
 San Jose State University;
 20 CHARLOTTE SUNSERI, in her
 official capacity as NAGPRA
 21 Coordinator at San Jose State
 University; and ALISHA MARIE
 22 RAGLAND, in her official capacity as
 Tribal Liaison at San Jose State
 23 University,
 24 Defendants.

INTRODUCTION

1
2 1. San Jose State University (SJSU or University) has embarked upon a
3 poorly disguised campaign of retaliation against Professor Elizabeth Weiss because
4 University officials do not approve of her views on controversial academic issues
5 relevant to her field of study, physical anthropology.

6 2. When some of Professor Weiss’s academic writings and other expression
7 provoked controversy among her colleagues and on Twitter, University officials
8 responded by taking several adverse actions against her including: 1) directing
9 Professor Weiss to not share her views about a prospective Native American studies
10 center and program; 2) eliminating her access to an anthropology listserv; 3) refusing
11 to provide departmental funds or support to allow Professor Weiss to organize a
12 speaker series; 4) eliminating or substantially curtailing her duties as Collections
13 Coordinator for the University’s collection of skeletal remains; 5) cutting off her access
14 to parts of the University’s collection of remains; 6) requiring her for the first time to
15 seek advanced approval from the University’s Office of Research Compliance before
16 conducting research; 7) placing research materials in an inferior setting that
17 continues to delay Professor Weiss’s ability to conduct research; and 8) failing to place
18 her on the thesis committees of graduate students engaged in the study of bones.

19 3. Defendants have also threatened to enact additional policies and
20 procedures that would further curtail her research by subjecting her ability to conduct
21 research to a vote by her department chair Defendant Roberto Gonzalez and by the
22 Anthropology Department Standing Committee. Defendants continue to plan to enact
23 such policies.

24 4. Furthermore, Defendants have threatened to discipline Professor Weiss
25 if she continues to teach her views to her students.

26 5. Defendants, all of whom are administrators, officers, or employees at
27 SJSU, have taken retaliatory actions against Professor Weiss because of her academic
28 research, writing, and opinions concerning the repatriation of Native American

1 remains to their affiliated tribe and other matters of public concern. Defendants'
2 actions are contrary to the guarantees of the First Amendment.

3 6. As a consequence of Defendants' actions, Professor Weiss has been
4 deprived of access to resources and research material, been delayed or completely
5 blocked in her ability to carry out her research, and suffered a severe loss of standing
6 and reputation at SJSU and in the broader academic community.

7 **JURISDICTION AND VENUE**

8 7. The claims in this action arise under the First and Fourteenth
9 Amendments to the United States Constitution pursuant to 42 U.S.C. § 1983. The
10 Court has jurisdiction over these federal claims under 28 U.S.C. § 1331 (federal
11 question) and § 1343(a) (redress for deprivation of civil rights).

12 8. Declaratory relief is authorized by the Declaratory Judgment Act, 28
13 U.S.C. § 2201.

14 9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1)–(2),
15 because this lawsuit concerns retaliatory actions taken by officials at SJSU, which is
16 located within this district.

17 10. Assignment to the San Jose Division is proper because this lawsuit
18 concerns retaliatory actions taken by officials at SJSU, which is located in San Jose
19 County which is within this division.

20 **PARTIES**

21 11. Plaintiff Elizabeth Weiss is an individual citizen of the United States
22 who lives in San Jose, California.

23 12. Stephen Perez is the interim president of SJSU, a public university that
24 is part of the California State University System and is responsible for retaliatory
25 actions taken against Professor Weiss. He is sued solely in his official capacity.

26 13. Vincent J. Del Casino is the Provost of SJSU and is responsible for
27 retaliatory actions taken against Professor Weiss. He is sued solely in his official
28 capacity.

1 museums to surrender Native American skeletal remains to tribal descendants.
2 Professor Weiss and her co-author James Springer argue in the book that such laws
3 undermine objective scientific inquiry and violate the Establishment Clause of the
4 United States Constitution by favoring religion over science.

5 22. The book ignited controversy among academics and on social media.
6 About a thousand professors and graduate students, including some of Professor
7 Weiss's colleagues, signed an open letter condemning the book as "anti-indigenous"
8 and "racist" for arguing that indigenous communities should not be given exclusive or
9 preferential control over remains of general scientific interest. No similar claims of
10 racism had been leveled by peer reviewers or the publisher before publication.
11 Moreover, Professor Weiss is not alone in her field regarding her views on the
12 repatriation of remains.

13 23. Professor Weiss has made similar arguments about repatriation for
14 years without controversy at SJSU. Defendants Gonzalez and Jacobs encouraged her
15 to write her book because they knew it would spark "lively discussions" both in the
16 academic community and in the classroom.

17 24. Their support abruptly ended after the public controversy occurred, after
18 which Defendants responded with escalating scrutiny of her work, culminating in
19 threats and retaliatory actions.

20 25. From December 2020 to September 2021, Defendants also fail to promote
21 material about Professor Weiss and her book including articles with high profile
22 placements in Science and USA Today, op-eds, and radio appearances. Defendants did
23 so due to their opposition to the viewpoint she expressed in her book. Defendants only
24 relented and began promoting Professor Weiss's material after counsel for Professor
25 Weiss sent a letter on August 19, 2021, warning Defendants that discrimination
26 against Professor Weiss would violate the First Amendment.

27 *Defendant Gonzalez Orders Professor Weiss not to Share her Views*

28 26. On December 3, 2020, SJSU hosted a public meeting (that Professor

1 Weiss joined) with three leaders of Native and American Indian studies programs
2 from across the California State University system to discuss the possibility of
3 starting a Native and American Indian studies program at SJSU. Defendant Del
4 Casino hosted the meeting.

5 27. In the Q&A section, Professor Weiss respectfully disagreed with the
6 panelists who advocated a prohibition against non-Native American persons working
7 in the program.

8 28. On December 11th, Professor Weiss received an email from Defendant
9 Gonzalez asking her to talk on the phone. When they spoke, Defendant Gonzalez told
10 her that she should not participate in events like this again or share her views because
11 her views may harm the feelings of junior faculty members. Given the context and
12 Defendant Gonzalez's role as her department chair, Professor Weiss reasonably
13 interpreted this directive as an order.

14 *Defendant Gonzalez Shuts Down Professor Weiss's Access to the Departmental*
15 *ListServ*

16 29. Since 2015, the SJSU Anthropology Department has maintained a
17 listserv for faculty on which participants were free to send emails to the list and
18 respond to others' messages.

19 30. This listserv was used to share a wide variety of content. For instance,
20 Professors would regularly announce the publication of books and other scholarship.
21 Individuals on the listserv would share volunteer opportunities or events that might
22 interest members of the listserv. Posts on the listserv also would touch on political or
23 other controversial topics.

24 31. On December 18, 2020, Anthropology Professor A.J. Faas shared a link
25 to the Cite Black Authors database, which is a database that promotes the work of
26 Black scholars and encourages scholars to cite such works in their articles.

27 32. Professor Weiss responded to this email with her view that "[a]lthough
28 the intent of Cite Black Authors may be well-meaning, as a scholar in search of

1 objective knowledge, I encourage researchers to look for the best source material and
2 realize that an author's ethnicity, race, or color of their skin has no actual bearing on
3 the validity of their contribution."

4 33. A few days later, Defendant Gonzalez sent an email to the listserv
5 praising Professor Faas for sending the email and sharing his belief that the website
6 was in line with "a massive push across the discipline to recognize these urgent
7 problems, and to confront them directly and rigorously."

8 34. On December 28, 2020, Professor Weiss shared a response to the open
9 letter that had been circulating condemning her book *Repatriation and Erasing the*
10 *Past*. Professor Weiss encouraged members of the listserv "to read *Repatriation and*
11 *Erasing the Past* with an open mind," stating that any "allegations of racism are
12 absolutely false" and that her "case against repatriation ideology is built on the
13 concept of treating everyone equally."

14 35. That same day Defendant Gonzalez e-mailed Professor Weiss to tell her
15 that he thought it was not "appropriate to use the departmental listserv for this
16 purpose" and that he thought her email "may unintentionally undermine the hard
17 work that has gone into building a viable online communication and networking
18 infrastructure."

19 36. Just two days later, on December 30, 2020, Defendant Gonzalez
20 restricted access to the listserv so only he and Professor Faas were able to send emails
21 out to the whole listserv.

22 37. On January 5, 2021, Defendant Gonzalez sent an email to the listserv
23 critiquing Professor Weiss's book and declaring that the "listserv is not the
24 appropriate forum for addressing this topic."

25 38. Defendant Gonzalez's decision to restrict use of the listserv was done in
26 retaliation for Professor Weiss's decision to express her views on the Cite Black
27 Authors email and to defend her book. Through his actions, Defendant Gonzalez
28 assumed the role of gatekeeper with the authority to prevent Professor Weiss from

1 defending her work or expressing her views on the listserv.

2 39. In a June 2021 online event for university deans and department chairs,
3 Defendant Gonzalez noted that the listserv was previously unmonitored and that
4 Professor Weiss's Cite Black Authors email response "led to some changes."

5 *Defendant Gonzalez Sponsors a Speaker Series Hostile to Professor Weiss and*
6 *Refuses to Authorize a Counterpoint Series*

7 40. In the eighteen years that Professor Weiss has been at SJSU, members
8 of the Anthropology Department have frequently invited guest speakers to come to
9 campus. There had never been a formal vote on whether to bring a speaker.

10 41. In his January 5, 2021, email critiquing Professor Weiss's book,
11 Defendant Gonzalez announced that he would "coordinate a series of virtual events
12 that address topics having to do with inequity and bias in the social sciences, so that
13 we can all be well informed about these crucially important issues."

14 42. Speakers presented views that Professor Weiss strongly disagreed with.
15 One speaker, Augustin Fuentes, argued that the Anthropology Department must be
16 affirmatively "anti-racist," because "[r]acism is everywhere, built into our systems and
17 thus present in our lectures, seminars, and labs." He also argued that "cancel culture"
18 does not exist, and that ideas that he considered biased or racist should be
19 aggressively critiqued and shut down. He also called for deans and chairs to take and
20 prioritize "anti-racist" actions in terms of selecting curriculum, evaluating faculty
21 members, and determining funding priorities.

22 43. On March 25, 2021, Professor Weiss emailed Defendant Gonzalez
23 proposing to put together an event for the Anthropology Department titled Combating
24 Cancel Culture: Why Diversity of Thought Still Matters. The purpose of the series
25 would be "to offer alternative perspectives to the current series" and to "engender an
26 open, constructive, and respectful debate about these issues." Professor Weiss
27 requested departmental support or sponsorship similar to the support provided by the
28 department to the previous series (including using a departmental Zoom account,

1 advertising the events using the listserv, tracking RSVPs, and paying an honorarium
2 to speakers).

3 44. Defendant Gonzalez responded that he could not “commit any
4 departmental funds or staff time to supporting another speaker series this semester.”

5 45. When Professor Weiss offered to hold the event a different semester,
6 Defendant Gonzalez then responded that he had just “realized that the Dean's Office
7 developed guidelines for speaker series sponsorships a few years ago” that he had
8 forgotten about and had not “informed the [Anthropology Standing Committee] or
9 faculty about them.” Although he did not apply those guidelines to the speakers for
10 his own series, he indicated that the standing committee would have to approve
11 Professor Weiss’s proposal and that based on his “informal conversations . . . most
12 seem to oppose the idea of a ‘Cancel Culture’ speaker series at this time.”

13 46. Defendant Gonzalez “realized” that the sponsorship guidelines existed
14 because he was looking for a pretext to reject Professor Weiss’s event. He also
15 discouraged other faculty from supporting her event because he disagreed with the
16 viewpoint that Professor Weiss’s invited speakers would express.

17 47. At a June 2021 event that is discussed below in greater detail, Defendant
18 Gonzalez expressed his satisfaction that Professor Weiss’s views had isolated her from
19 some colleagues and left her “really limited in her capacity to do things or demand
20 resources from the department.”

21 48. Professor Weiss corresponded soon after with Defendant Jacobs to
22 express several concerns: 1) Defendant Gonzalez was selectively enforcing the
23 guidelines against her and not against his own speakers and on “some event topics”
24 and not “other event topics;” and 2) Defendant Gonzalez had planned his speaker
25 series without the opportunity for a discussion among the faculty. Professor Weiss
26 explained that “[h]ad such a discussion occurred, I would have suggested a balanced
27 speaker series with multiple perspectives presented.”

28 49. Defendant Jacobs spoke to Defendant Gonzalez “about the use and non-

1 use of the [colleges] sponsorship guidelines” and Defendant Gonzalez said he would
2 discuss at an upcoming Anthropology faculty meeting how to “move forward in a more
3 equitable manner.”

4 50. At his behest, the Anthropology Department Standing Committee
5 adopted a policy where a faculty member may invite speakers and schedule university
6 space without sponsorship, but any request for sponsorship and staff assistance
7 requires a departmental vote. This policy subjects Professor Weiss’s ability to invite
8 speakers and promote her viewpoint to a veto by her ideologically opposed colleagues.

9 51. Defendant Jacobs offered to facilitate conversations between Professor
10 Weiss and the Center for Faculty Development to help organize a campus-wide event.
11 But Defendant Jacobs never followed through on those promises and, as of June 2022,
12 there has been no movement on a speaker series addressing the problems with cancel
13 culture in either the Anthropology Department or the College of Social Sciences.

14 52. Neither Defendant Jacobs nor Defendant Gonzalez intend to authorize
15 or facilitate such a series. To the contrary, Defendants Gonzalez and Jacobs intend to
16 continue to oppose any effort by Professor Weiss to organize a speaker series and will
17 use their position and influence to block any such event from occurring.

18 *Defendant Gonzalez Threatens to Retaliate Against Professor Weiss for Teaching*
19 *her Views on Repatriation in her Classes*

20 53. In early June 2021, Defendant Jacobs hosted a Zoom event for deans and
21 chairs titled “What to Do When a Tenured Professor is Branded a Racist.” The event,
22 which was entirely about Professor Weiss, was attended by many others because it
23 did not require a password for attendance and was not closed to the public.

24 54. During the event, Defendant Gonzalez critiqued Weiss’s “retrograde
25 racist approach to anthropology.” He expressed regret that Weiss was tenured and
26 that he therefore did not have greater ability to take action against her. He also
27 branded the argument in her book “professionally incompetent,” and suggested that
28 this is a factor that could be used against her at her next post-tenure review.

1 55. Defendant Gonzalez was asked what obligation he had to prevent
2 teachers like Professor Weiss from exposing students to those views in the classroom.
3 Gonzalez wrongly claimed that Professor Weiss has “never talked about her writings
4 in the classroom” and that so far he has “gotten zero complaints about students
5 hearing these things in class.” He then explained that “if it was in the classroom” he
6 would “have a very different approach to this.”

7 56. Professor Weiss has long taught about repatriation in her classes and
8 plans to continue to do so. In particular, this topic features centrally in her classes on
9 Bioarcheology and Human Osteology.

10 57. In light of the increasing contention surrounding the topic of
11 repatriation, students have begun to voice complaints about being exposed to
12 Professor Weiss’s views. For instance, one student in her most recent class on
13 mummies complained that she had assigned her a book which “showed bias towards
14 a stance on certain things.” A student complained that she was not “more sensitive to
15 class diversity” and that her “[t]asteless comments made about NAGPRA and
16 repatriation given class and school diversity seemed unsensitive and created an
17 uncomfortable atmosphere.” Professor Weiss expects that student complaints of this
18 nature will increase in light of the publicity that accompanied the publication of her
19 book.

20 58. Professor Weiss wants to encourage her students to think about and
21 debate the tradeoffs when we remove historically and scientifically significant objects
22 from the realm of study and so she plans to continue to expose students to the topics
23 raised in her book as well as to contrary viewpoints.

24 59. Concerned about what she heard during the Zoom event, Professor Weiss
25 asked Defendants Gonzalez and Jacobs for a letter assuring her that her ability to
26 assign her book, to speak about her research in class, and to access skeletal remains
27 for research purposes would not be restricted. She also asked that Defendant Gonzalez
28 retract his threats to act against her. Defendant Jacobs informed Professor Weiss that

1 Defendant Del Casino and the Office of Faculty Affairs would not let him provide her
2 a letter and that Defendant Gonzalez would not retract his statements. He also told
3 Professor Weiss that he was receiving pressure from others to take action against her.

4 60. Counsel for Professor Weiss sent a letter on her behalf addressed to
5 Defendants Del Casino, Jacobs, and Gonzalez on August 19, 2021. The letter warned
6 SJSU that any retaliatory actions taken against Professor Weiss would violate her
7 First Amendment freedoms and specifically warned the University not to take any
8 action barring Professor Weiss from accessing SJSU's collection of skeletal remains.

9 61. On information and belief, Defendant Gonzalez plans to take further
10 actions against Professor Weiss if she continues to teach her views on repatriation,
11 including putting forward additional resolutions targeting her and enacting policies
12 that limit her freedom in the classroom.

13 *Professor Weiss Publishes an August 2021 Op-Ed and Sends a September 2021*
14 *Tweet which Ignites More Controversy*

15 62. On August 31, 2021, Professor Weiss published an op-ed in The Mercury
16 News and East Bay Times laying out her critique of the newly enacted AB 275, which
17 amends CalNAGPRA. Professor Weiss critiqued the amendments with the same
18 arguments raised in her book. Soon after the op-ed was published, the University
19 received multiple vitriolic emails from members of the public and academic critics
20 with demands for discipline or termination.

21 63. Professor Weiss's tweet sharing the article received over 1,000 inflamed
22 comments on twitter.

23 64. Further controversy ensued after September 18, 2021, when Professor
24 Weiss tweeted a picture of herself holding a skull from the SJSU collection with the
25 text, "So happy to be back with some old friends," expressing her excitement at being
26 able to return to the collection after a pandemic-induced absence.

27 65. There is no generally accepted standard of practice that discourages the
28 publication of photographs of professors holding or interacting with skeletal remains.

1 To the contrary, she and other renowned anthropologists and journalists have
2 frequently posted similar images of scientists holding skeletal remains without
3 controversy. Indeed, the Anthropology Department of SJSU had several similar
4 pictures up on its website at the time of Professor Weiss's tweet.

5 66. There is no generally accepted standard of practice that discourages
6 holding skeletal remains without gloves. To the contrary, this is common practice,
7 since wearing gloves can increase the likelihood that remains will be dropped.

8 67. Nevertheless, Professor Weiss's tweet sparked more letters to the
9 University and social media posts calling for the University to remove or otherwise
10 retaliate against her.

11 68. On September 29, 2021, Defendant Del Casino published a letter to the
12 University community which declared that the tweet "ha[d] evoked shock and disgust
13 from our Native and Indigenous community on campus and from many people within
14 and outside of SJSU." Del Casino claimed there were "many things in the image itself
15 that do not align with the values of SJSU or of academic inquiry." Del Casino further
16 claimed that this image was contrary to "the ethical guidelines of the social science
17 disciplines that govern such practices and laws such as AB 275." Del Casino linked
18 the tweet to the broader debate over repatriation, noting that "[t]he image is tied to a
19 larger argument in the same Twitter feed" regarding whether laws requiring
20 repatriation "are anti-science, or at least impede scientific pursuits because they favor
21 religious and cultural values over scientific ones."

22 69. In response, Professor Weiss sent an email out to the University
23 community which explained that her handling of the remains and her photograph was
24 consistent with University practice and was not inconsistent with either NAGPRA or
25 CalNAGPRA.

26 70. On October 4, 2021, Professor Weiss was quoted in a Mercury News
27 article about the controversy, arguing that "[s]cience . . . is more important than
28 sensitivities" and "that being photographed with a skull of a Native American is little

1 different than showing Egyptian mummies or Otzi, the iceman.”

2 71. In November 2021, Defendant Gonzalez proposed a statement on human
3 remains which expressly denounces Professor Weiss for her tweet. After a secret ballot
4 vote by the Anthropology Standing Committee, Defendant Gonzalez’s statement was
5 posted on the Department of Anthropology’s website.

6 *The University’s Directive Strips Away Professor Weiss Access to the Facility and*
7 *Eliminates Her Duties*

8 72. Since her appointment in 2004, Professor Weiss has served as SJSU’s
9 Collections Coordinator for SJSU’s large collection of skeletal remains.

10 73. As Collections Coordinator, Professor Weiss is in charge of establishing
11 protocols for and facilitating research of SJSU’s extensive collection of skeletal
12 remains. As her appointment letter defining her job explains: “You will take
13 responsibility to curate and manage the department’s human osteological collections,
14 in consultation with the department chair. All management will be in compliance with
15 NAGPRA and California State guidelines and in consultation with the appropriate
16 culturally affiliated groups.” Furthermore, the “maintenance of the collection is [her]
17 chief departmental service requirement.”

18 74. SJSU’s collection includes Native American remains subject to NAGPRA
19 as well as non-Native American remains and non-human remains. SJSU also stores
20 x-rays of remains in the curation facility.

21 75. In her research and curatorial responsibilities, Professor Weiss has
22 always complied strictly with NAGPRA and the California Native American Graves
23 Protection and Repatriation Act (CalNAGPRA).

24 76. On October 6, 2021, the University announced a new Interim
25 Presidential Directive regarding the curation facilities holding SJSU’s skeletal
26 remains. The directive bars Professor Weiss from accessing the facility that she has
27 curated for around eighteen years and places control over access exclusively in the
28 hands of the University’s NAGPRA Coordinator and a newly appointed Tribal Liaison.

1 77. The directive, entitled “San Jose State University’s Interim Protocol for
2 Curation Spaces in Alignment with NAGPRA, CalNAGPRA, AB 275 (Interim
3 Presidential Directive, PD-2021-03)” sets out four restrictions on the curation space
4 housing SJSU’s skeletal collection:

- 5 • The curation spaces at SJSU that house the Collections will be
6 exclusively managed by the SJSU NAGPRA Coordinator and the SJSU
7 Tribal Liaison, supplemented by student assistants who are
8 appropriately trained and supervised to assist with the inventory
9 process.
- 10 • The Collections will continue to remain in a locked, secure area
11 on campus, and all access will be overseen by the SJSU NAGPRA
12 Coordinator and the SJSU Tribal Liaison.
- 13 • Any physical access to or use of the Collections, including for
14 research or teaching, will require written approval of the NAGPRA
15 Coordinator and Tribal Liaison.
- 16 • Audio, video, or photographic devices are prohibited in the
17 curation spaces, as is taking photo images or videos of human remains,
18 funerary objects, or the boxes in which these materials are held.

19 78. On January 18, 2022, the University adopted an updated interim
20 directive that clarifies that research on the Native American collection would not be
21 permitted.

22 79. As SJSU’s only physical anthropologist, Professor Weiss is the only
23 faculty member that regularly accesses and utilizes SJSU’s skeletal remains collection
24 for her research. Any actions that the University takes to restrict access to the skeletal
25 remains or the curational facility directly and uniquely harm Professor Weiss.

26 80. The interim directive cuts Professor Weiss out of her contractually
27 assigned leadership responsibilities for the collection and impedes her research. Since
28 the directive was announced on October 6, 2021, Professor Weiss has been locked out
of the curational facility that she is supposed to manage. The lock and alarm codes
were changed to bar her access, and her requests to receive an updated alarm code or
key have been refused by Defendants.

 81. In doing so, Defendants have limited Professor Weiss’s access to remains
that are not protected by NAGPRA, CalNAGPRA, or AB 275 including non-Native
American remains and non-human collections (such as boxes of data on chimpanzees

1 and a vast collection of non-human animal bones from California sites). The breadth
2 of the University's directive, which extends far beyond limiting access to the Native
3 American collection demonstrates its retaliatory motive.

4 82. If Professor Weiss were allowed to access the curational facility she
5 would not conduct any unauthorized research on Native American remains or
6 interfere with the repatriation of Native American remains in any way.

7 *Defendants Try to Deny Professor Weiss Access to the Non-Native Remains*

8 83. Shortly after the announcement of the new directive, Professor Weiss
9 emailed Defendant Gonzalez requesting access to the facility so that she could do
10 research on non-NAGPRA remains, including the Carthage collection, which is a
11 collection of non-Native remains from Tunisia, and assess what other materials that
12 are not protected by NAGPRA could be utilized for research.

13 84. Defendant Gonzalez claimed that he was supportive of Professor Weiss's
14 ability to conduct this research. But Professor Weiss later learned that he and other
15 Defendants were looking for ways to delay or stymie her research altogether.

16 85. Defendant Gonzalez first made Professor Weiss reach out to Defendants
17 Ragland and Sunseri to seek their consent even though they had no authority over
18 the non-NAGPRA remains.

19 86. Defendant Ragland's response, which she did not share with Professor
20 Weiss, was that Professor Weiss should be disqualified "from working independently
21 with human remains" as a result of her "recent scientifically racist publications."

22 87. Gonzalez did not defend Professor Weiss's academic freedom; instead he
23 claimed that someone at the University's Office of Research Compliance would need
24 to grant permission and that he would urge them to look for "guidelines on cultural
25 patrimony" that might apply and limit Professor Weiss's ability to conduct research.

26 88. The Office of Research Compliance did not identify any reason that it
27 could deny Professor Weiss access to the Carthage collection.

28 *Defendant Gonzalez Proposes a Photography Policy that Would Cripple*

1 *Professor Weiss's Ability to Conduct Research*

2 89. When the Office of Research Compliance did not find any basis to prevent
3 Professor Weiss's research, Defendant Gonzalez developed a new plan. He told
4 Professor Weiss that her research would have to wait until the Anthropology
5 Department could meet to establish new research protocols. He did so even though
6 there was no non-retaliatory reason to prevent Professor Weiss from accessing
7 remains that she was entitled to access as part of her job duties and that were not
8 subject to NAGPRA, CalNAGPRA, or the interim directive.

9 90. At a meeting of the Anthropology Department Standing Committee on
10 November 5, 2022, Defendant Gonzalez proposed several changes which would
11 directly impact Professor Weiss's research and responsibilities. He did so without any
12 consultation with her.

13 91. First, Defendant Gonzalez proposed that the role of Collections
14 Coordinator be restructured so that the coordinator would expressly only be
15 responsible for the non-Native collection while Defendant Sunseri would be
16 responsible for the NAGPRA collections. He also proposed that the holder of the
17 position of Collections Coordinator would rotate among professors in the Anthropology
18 Department. These changes would have been directly contrary to Professor Weiss's
19 contractual duties.

20 92. Professor Weiss spoke out against this proposal. She argued that the
21 change of duties would violate her contract and could only be made in negotiation and
22 consultation with the Dean. Defendant Gonzalez agreed to table this proposal.

23 93. Second, Defendant Gonzalez proposed that photography of all remains
24 in the laboratory be banned; this change would have severely compromised Professor
25 Weiss's ability to conduct research.

26 94. Members of the committee, who were ideologically opposed to her
27 research and had signed the open letter against her, spoke out in favor of banning
28 photographs because of the concern that even photos of non-Native American remains

1 could somehow harm Native American communities.

2 95. Professor Weiss responded by pointing out that the department had
3 never before been against photography, had actually strongly encouraged the
4 promotion of anthropology through the use of photography, and that this effort was
5 clearly triggered in response to her views on repatriation and her photograph.

6 96. Professor Weiss asked whether these limits on photography would apply
7 to field research and was told that they would not. Only her laboratory research would
8 be affected. She explained that the photography ban would be devastating to her
9 research.

10 97. After Professor Weiss spoke to him further, Defendant Gonzalez put
11 forward an alternative proposal: “Photographing skeletal remains from the
12 collections is not allowed without written approval from the Department Chair, in
13 consultation with the Standing Committee and the Dean. Video recordings of
14 skeletal remains from the collections are not allowed, nor are social media posts.”

15 98. This move would have put Professor Weiss’s academic future in the
16 hands of faculty members who had expressed opposition to her and her work including
17 Defendant Gonzalez and other faculty members who signed the open letter against it.

18 99. Professor Weiss suggested an alternative that would allow her to
19 continue to take and use photographs in appropriate ways: “Photography and
20 videography should not be undertaken for personal use, and should only be used for
21 purposes of teaching, scientific research and publication, public outreach, and the
22 promotion of anthropology.”

23 100. Defendant Gonzalez told Professor Weiss that he planned to put these
24 two proposals up for a faculty vote and that after speaking to other faculty members
25 he thought her proposal would not be acceptable.

26 101. Professor Weiss expressed her concern that those who are in different
27 fields of anthropology would be determining her ability to do research and about the
28 lack of standards in making these decisions. She also pointed out the many problems

1 she saw with the proposal, including that no other professor in the department is
2 required to get approval by the department for research or data collection endeavors.

3 102. Defendant Gonzalez then sent out an email on November 19, 2021,
4 saying that he would “postpone” a vote for further discussion and until a new protocol
5 could be developed, the faculty should use the existing protocols developed in Fall
6 2008.

7 103. On information and belief, Defendant Gonzalez plans to once again put
8 forward additional policies that would curtail Professor Weiss’s research, such as a
9 ban on taking and sharing photographs or a requirement that Professor Weiss seek
10 departmental approval before conducting research on or take pictures of skeletal
11 remains.

12 *Defendants Finally Allow Professor Weiss to Access the Carthage Collection, but*
13 *Only under Inferior Working Conditions*

14 104. From October 6, 2021, to November 15, 2021, Professor Weiss was not
15 allowed to access the Carthage collection. It was only after Defendant Gonzalez
16 temporarily ceased his efforts to impose more restrictive protocols that he allowed
17 Professor Weiss to begin to access the Carthage Collection.

18 105. But she was still not allowed to access the remains in the curational
19 facility. Instead, the remains were moved to two adjoining rooms outside the
20 curational facility. These storage locations are inadequate in several respects,
21 resulting in ongoing impairment of Professor Weiss’s research.

22 106. One of the rooms used to store the remains is a classroom in active use.
23 The classroom is inaccessible to Professor Weiss for research purposes when classes
24 are in session in that room. During the semester, the room is used for classes all day,
25 Monday through Thursday, including at least some evenings. Because students
26 regularly access this classroom it is also not a safe and secure space for the storage of
27 remains.

28 107. The other room that the remains are stored in is the research laboratory.

1 Previously departmental policy was that for safety and security reasons remains
2 should not remain in the research laboratory but should always be returned to the
3 curation facility. This rule is also part of the protocol that Defendant Gonzalez
4 proposed in November 2021.

5 108. In late November 2021, Professor Weiss began going through the
6 collection and found that the collection is poorly organized. Further, the boxes are
7 stored and organized in such a way as to impede research. Professor Weiss cannot go
8 through them in a specific order or easily take out one box at a time. Delays due to
9 disorganization will continue so long as the Carthage collection is not stored in a
10 location suited to organizing and storing human remains, i.e., the University's
11 curational facility.

12 109. Professor Weiss has repeatedly requested that she be allowed to access
13 these remains in the curation facility or that they be moved to a more secure and
14 accessible location.

15 110. For over seven months Defendant Gonzalez said that he would work to
16 find a more appropriate destination for the remains. On information and belief,
17 Defendant Gonzalez had no intention of actually securing a new space for Professor
18 Weiss.

19 111. Finally, on May 5, 2022, Defendant Gonzalez notified Professor Weiss of
20 his intention to secure another cabinet in the research laboratory so that the remains
21 currently in the classroom could be stored in the research laboratory as well, but that
22 he could otherwise not find any other space on campus for her to conduct her research.

23 *Defendants Delay or Deny Access to Some of the Other Non-NAGPRA Remains*

24 112. Since October, Professor Weiss has requested access to other non-human
25 materials in the collection. This includes chimpanzee data that comes from the studies
26 of Jane Goodall, other nonhuman (nonprimate) skeletal, and faunal material.

27 113. Defendants claimed to do a thorough review of the facility during the
28 inventory process and not find any additional non-NAGPRA material.

1 114. Professor Weiss knows exactly where these materials are located and
2 could easily identify them for the Defendants. She has offered on several occasions to
3 accompany Defendants into the curational facility to identify them. But these offers
4 have repeatedly been ignored.

5 115. After Professor Weiss's repeated inquiries, on May 9, 2020, Defendant
6 Gonzalez finally asked Defendants Sunseri and Ragland to conduct another search
7 "for boxes of data on chimpanzees or other possible non-NAGPRA collections."

8 116. Defendants finally found five boxes of Chimpanzee data and placed them
9 into the research laboratory. But they have not located and moved any of the other
10 material that Professor Weiss has been requesting for more than eight months.

11 117. Had Professor Weiss not filed a lawsuit and continually put pressure on
12 Defendants to act, they would not have found even this data for her even though she
13 is fully entitled to access it and has been requesting it for months. Professor Weiss
14 continues to request access to other portions of the collection including faunal
15 material. But despite repeatedly asking each of the Defendants for access she has still
16 not been granted access eight months later.

17 *The Office of Research Compliance Adopts a Policy that Would Seriously Delay*
18 *Professor Weiss's Research Endeavors*

19 118. Professor Weiss's research on human remains has never previously been
20 subject to review by SJSU's Office of Research Compliance.

21 119. But sometime after the interim policy was adopted, SJSU surreptitiously
22 added a requirement that researchers looking to study human remains would need to
23 apply for approval to the Office of Research Compliance.

24 120. A research compliance timeline on the website shows that approval
25 would need to be requested very early in the research process, even earlier than
26 researchers looking to utilize controlled substances or to conduct human studies would
27 need to apply.

28 121. There is no justification for requiring research proposals for the study of

1 human remains to be submitted so far in advance.

2 122. The requirement for advanced approval from the Office of Research
3 Compliance means that SJSU can ignore Professor Weiss's requests and indefinitely
4 delay her research. This is consistent with the pattern of that Defendants have
5 repeatedly done since the interim order was issued,

6 123. No other institution in the California State University system has
7 adopted a similar policy requiring anthropologists to get approval from their offices of
8 research compliance to conduct routine research on human remains.

9 124. The addition of an approval process for human remains research was
10 adopted in retaliation for Professor Weiss's speech and in order to exercise greater
11 control over her research (just as Defendant Gonzalez hoped for in his October 2021
12 email).

13 *The Loss of Curatorial Responsibility Harms Professor Weiss's Standing and*
14 *Deprives Her of Academic Opportunities*

15 125. For eighteen years, Professor Weiss has been responsible for controlling
16 access to the University's collection of remains. In her capacity as Collections
17 Coordinator, she has frequently received inquiries from other researchers and been
18 able to work with them to facilitate their access.

19 126. Because of the University's actions, Professor Weiss is no longer able to
20 exercise her leadership role in facilitating and coordinating access to the University's
21 collection of remains.

22 127. As discussed above, part of the collection remains in the curatorial
23 facility and Professor Weiss has no access. The remaining part of the collection is
24 poorly stored and is not in a place where other researchers could access it.

25 128. When others have reached out seeking access, Professor Weiss has had
26 to tell them that she is no longer in charge of access to the collection.

27 129. Having her duties regarding access stripped away has harmed Professor
28 Weiss's standing and reputation among her peers.

1 130. This loss of standing will make it more difficult for Professor Weiss to
2 publish, be invited to academic conferences, and exert an influence in her field.

3 131. In light of the imminent loss of the NAGPRA collection which accounts
4 for about 95% of SJSU's skeletal remains, Professor Weiss plans to work to expand
5 SJSU's research collection by acquiring additional collections of skeletal remains or
6 establishing an autopsy collection at SJSU (as outlined in a 2014 feasibility report
7 that she prepared). But without a space to safely secure and house these collections,
8 she will not be able to approach potential donors and persuade them to donate. And
9 because her position as collection coordinator has been diminished, Professor Weiss
10 may also not have the standing to negotiate with those potential donors on the
11 University's behalf.

12 *Defendants Deny Professor Weiss Placement on Thesis Committees*

13 132. As the SJSU Anthropology Department's only physical anthropologist,
14 Professor Weiss sits on the thesis committee of graduate students when their research
15 involves the study of bones.

16 133. Several years ago (in 2015), Professor Weiss was not assigned to the
17 thesis committee of a graduate student in her field. The resulting thesis was riddled
18 with serious errors that would have been identified had Professor Weiss been on the
19 review panel. As a result of that experience, the Anthropology Department adopted a
20 policy of ensuring that Professor Weiss sits on the thesis committee of students when
21 their research relates to the study of bones.

22 134. The membership of a thesis committee is determined not only by student
23 preference but also by faculty workload and expertise.

24 135. Chloe Angst is a graduate student that is working on a thesis that
25 depends on a forensic study of nonhuman animal remains to understand post-mortem
26 changes in deceased homeless Californians. Professor Weiss had worked with Ms.
27 Angst and provided guidance over the course of multiple semesters. But unexpectedly
28 Professor Weiss was not assigned to sit on the thesis committee.

1 her views regarding the repatriation of Native American remains, Defendants have
2 retaliated and are retaliating against Professor Weiss for exercising her First
3 Amendment rights.

4 144. Professor Weiss's publications, articles, classroom lessons, and tweets on
5 the topic of the repatriation of human remains, as well as her views on the propriety
6 of taking pictures with these remains, are matters of public concern and protected by
7 the First Amendment. So too are Professor Weiss statements critical of efforts to favor
8 authors based on their race and to discriminate against faculty members who are not
9 Native American.

10 145. Defendants have taken several adverse actions against Professor Weiss
11 in retaliation against her for her speech on matters of public concerns. This includes
12 1) Defendant Gonzalez directing Professor Weiss not share her views at meetings; 2)
13 Defendant Gonzalez's decision to eliminate listserv access in retaliation for her
14 speech; 3) Defendant Gonzalez's application of inconsistent policies to deny her the
15 ability to host a speaker series; 4) the adoption of an interim policy regarding research
16 that effectively eliminated Professor Weiss's duties as Collections Coordinator in
17 violation of her contractual responsibilities; 5) continuing efforts by Defendants to
18 block Professor Weiss from accessing parts of the University's collection of remains;
19 6) forcing Professor Weiss to store materials in an inferior setting not suitable for ease
20 of access for her research endeavors; 7) requiring Professor Weiss to seek approval
21 from the Office of Research Compliance; and 8) failing to place her on the thesis
22 committees of graduate students engaged in the study of bones.

23 146. But for Professor Weiss's speech the University would not have taken
24 these actions.

25 147. These actions were not required by NAGPRA, CalNAGPRA, or any other
26 law.

27 148. Professor Weiss has suffered irreparable harm as a result of Defendants'
28 unconstitutional retaliation.

1 an unconstitutional condition on her in violation of her First Amendment rights.

2 155. Defendants have refused to retract or disavow Defendant Gonzalez's
3 threats conditioning Professor Weiss's continued ability to teach on her willingness to
4 refrain from teaching students her views on repatriation. As a result of the threats
5 from Defendant Gonzalez, which have never been retracted, and the continuing
6 pressure being put on Defendant Jacobs and other University officials, Professor
7 Weiss has a credible fear that the University will take further retaliatory actions
8 against her for her speech, including but not limited to attempting to remove her from
9 the classroom, take away her tenure, and terminate her employment.

10 156. Despite the continuing threat of retaliation and the resulting chilling
11 effect, Professor Weiss plans to continue to share her views about Native American
12 repatriation and the proper handling of human remains both in the media and with
13 her students.

14 **RELIEF SOUGHT**

15 Wherefore, Plaintiff respectfully requests the Court to enter judgment against
16 Defendants as follows:

17 1. Declaring that Defendants' actions constituted unlawful retaliation
18 against Plaintiff for her protected First Amendment activities.

19 2. Granting a permanent injunction against Defendants and Defendants'
20 officers, agents, affiliates, servants, successors, employees, and other persons as
21 follows:

22 a. Enjoining Defendants from maintaining, enforcing or adopting
23 any policy, custom or practice limiting Professor Weiss's access to the curation facility
24 to conduct research on any non-NAGPRA remains.

25 b. Enjoining Defendants from changing or altering the terms and
26 conditions of Professor Weiss's employment, including her responsibilities as
27 Collections Coordinator, in response to her expression of her viewpoint on matters of
28 public concern.

1 c. Enjoining Defendants from maintaining, enforcing, or adopting
2 any policy, custom, or practice that bars Professor Weiss from photographing the non-
3 NAGPRA human and non-human remains in its collection or that requires her to seek
4 the approval of Defendants or the Anthropology Standing Committee.

5 d. Enjoining Defendants from maintaining, enforcing, or adopting
6 any policy, custom, or practice requiring Professor Weiss to seek approval from the
7 University's Office of Research Compliance before conducting research.

8 e. Enjoining Defendants from maintaining, enforcing, or adopting
9 any policy, custom, or practice that would require Professor Weiss to change her
10 course content on the topic of repatriation due to the viewpoint expressed therein.

11 f. Enjoining Defendants from maintaining, enforcing, or adopting
12 any policy, custom, or practice requiring Professor Weiss to seek departmental
13 approval for her proposed Combating Cancel Culture: Why Diversity of Thought Still
14 Matters speaker series.

15 g. Enjoining Defendants from maintaining, enforcing, or adopting
16 any policy, custom, or practice barring Professor Weiss from sending messages using
17 the anthropology listserv.

18 h. Enjoining Defendants from maintaining, enforcing, or adopting
19 any policy, custom, or practice that would bar Professor Weiss from sitting on thesis
20 committees due to her viewpoint on repatriation, and requiring Defendants to enforce
21 the existing departmental policy, custom, or practice of having Professor Weiss sit on
22 the thesis committee of students when their research involves the study of bones

23 3. Entering judgment for Plaintiff and against Defendants for the
24 deprivation of her rights;

25 4. Awarding Plaintiff nominal damages for the violation of her rights;

26 5. Awarding Plaintiff's costs and attorneys' fees under 42 U.S.C. § 1988;
27 Awarding such further relief as the Court deems just and proper.

28 DATED: June 9, 2022.

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Respectfully submitted,

DANIEL M. ORTNER
ETHAN W. BLEVINS
Pacific Legal Foundation

By s/ Daniel M. Ortner
DANIEL M. ORTNER

Attorneys for Plaintiff
Elizabeth Weiss

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2022, Opposing Counsel received the foregoing AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF via CM/ECF service.

s/ Daniel M. Ortner
DANIEL M. ORTNER, No. 329866

Kiren Mathews

From: ECF-CAND@cand.uscourts.gov
Sent: Thursday, June 09, 2022 2:49 PM
To: efilng@cand.uscourts.gov
Subject: Activity in Case 5:22-cv-00641-BLF Weiss v. Perez et al Amended Notice of Removal

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U.S. District Court

California Northern District

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The following transaction was entered by Ortner, Daniel on 6/9/2022 at 2:48 PM and filed on 6/9/2022

Case Name: Weiss v. Perez et al
Case Number: [5:22-cv-00641-BLF](#)
Filer: Elizabeth Weiss
Document Number: [82](#)

Docket Text:

AMENDED NOTICE OF REMOVAL against All Defendants, AMENDED COMPLAINT *FIRST AMENDED COMPLAINT* against All Defendants. Filed by Elizabeth Weiss. (Ortner, Daniel) (Filed on 6/9/2022)

5:22-cv-00641-BLF Notice has been electronically mailed to:

Bryan H. Heckenlively Bryan.Heckenlively@mto.com, stephanie.ferrell@mto.com

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185638bd64e093d52ce6f4baab141dbd62602109a7677ca56c9562849fe]]